No. 00-454

Supreme Court, U.S.
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*In The*

# Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

*Petitioner,*

v.

JOE SHIRLEY, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF *AMICI CURIAE* OF THE COLORADO RIVER INDIAN TRIBES, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, FIRST MESA CONSOLIDATED VILLAGES OF THE HOPI TRIBE, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING RESPONDENTS

SUSAN M. WILLIAMS
*Counsel of Record*
M. KATHRYN HOOVER
WILLIAMS, JANOV & COONEY, P.C.
2501 Rio Grande Boulevard NW
Albuquerque, New Mexico
87104-3223
(505) 842-6961

*Attorneys for the Colorado River Indian Tribe, Eastern Shoshone Tribe of the Wind River Reservation, First Mesa Consolidated Villages of the Hopi Tribe, Lummi Nation, Pueblo of San Felipe, and Zuni Indian Tribe*

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## BRIEF *AMICI CURIAE* OF THE COLORADO RIVER INDIAN TRIBES, EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, FIRST MESA CONSOLIDATED VILLAGES OF THE HOPI TRIBE, LUMMI NATION, PUEBLO OF SAN FELIPE, AND ZUNI INDIAN TRIBE SUPPORTING RESPONDENTS

Pursuant to Sup. Ct. R. 37, the Colorado River Indian Tribes of Arizona and California, the Eastern Shoshone Tribe of the Wind River Reservation of Wyoming, First Mesa Consolidated Villages of the Hopi Tribe of Arizona, the Lummi Nation of Washington, the Pueblo of San Felipe of New Mexico, and the Zuni Indian Tribe of New Mexico and Arizona file this brief *amici curiae* in support of Respondents in the above-entitled case. Petitioner, Atkinson Trading Company, Inc., and Respondents, Joe Shirley, *et al.*, have consented in writing to the filing of this brief.[1]

### INTEREST OF *AMICI CURIAE*

*Amici* are five Indian tribes – the Colorado River Indian Tribes, the Eastern Shoshone Tribe, the Lummi Nation, the Pueblo of San Felipe, and the Zuni Tribe – and First Mesa Consolidated Villages, one of the nine self-governing villages of the Hopi Tribe. *Amici* share a common interest in the perpetuation of tribal governments, the fostering of tribal judicial systems, and the

[1] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

defense of tribal sovereignty. *Amici* were affected to varying degrees by the assimilationist policies that held sway at the end of the 19th century. While all of the *amici* suffered substantial losses to their ancestral lands, the lands established as reservations for the Pueblo of San Felipe, the Hopi Tribe and the Zuni Tribe have remained largely intact. In contrast, much of the reservation land of the Colorado River Indian Tribes, the Eastern Shoshone Tribe, and the Lummi Nation was allotted to individual tribal members, with the remainder opened to non-Indian settlement pursuant to the General Allotment (Dawes) Act. Ch. 119, 24 Stat. 388 (1887). While the policies that paved the way for this encroachment on the tribal land base have been repudiated by Congress, remnants of these policies persist. The most notable reminder of these destructive policies is the presence within many reservations of substantial quantities of non-Indian owned fee land.

Like the Navajo Nation, *Amici* exercise jurisdiction over reservation lands. Tribal efforts to govern all the lands within their reservations, particularly non-Indian owned fee lands, has proven to be one of the greatest challenges to tribal self-government. *Amici* urge the Court to hold that questions regarding the scope of tribal legislative authority, including the tribal power to tax and regulate activities occurring within their reservations, are questions of tribal law. *Amici* acknowledge that at times these questions must be answered with reference to the dictates of Congress as reflected in treaties, statutes, and opinions of the federal courts construing Congressional intent. However, *amici* do not believe that this reference to federal law turns every assertion of tribal legislative

power over non-Indians found within their reservations into a federal question subject to review in the federal courts.

## SUMMARY OF ARGUMENT

This brief will address what is sometimes referred to as the "Indian abstention" doctrine and the scope of federal court review when an Indian tribal court has decided that it has jurisdiction to review a reservation-based matter involving non-Indian parties and has decided the case before it on the merits.

We begin, as we must, with a review of Congressional pronouncements on these issues. However, that review is brief, as "there is no . . . legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians." *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 854 (1985). Nevertheless, in *National Farmers Union*, this Court held that a challenge to a tribal court's assertion of civil adjudicatory power over a non-Indian must be answered with reference to federal law and therefore gives rise to a federal question. *Id.* at 852. However, the Court also established a rule requiring as a matter of comity that federal courts abstain when presented with a civil matter arising out of reservation based activity, regardless of the source of federal jurisdiction, to allow the tribal courts to determine their jurisdiction in the first instance. *Id.* at 856-57; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). *Amici* argue that, read together, the holdings of *National Farmers Union* and *Iowa Mutual* establish the

proper balance between the interests of Indian tribes in comprehensive jurisdiction over their reservations and the interests of non-Indians engaged in activity within reservation boundaries. The decisions establish a rule of deference to tribal court decision-making while providing adequate protection, through federal court review of tribal court assertions of adjudicatory jurisdiction, for non-Indians.

*Amici* argue further that *Iowa Mutual* establishes the scope of federal court review after a party has exhausted its tribal remedies. In *Iowa Mutual*, the Court instructed that, if a federal court determines that a tribal court properly decided the question of its jurisdiction, there will typically be no need for further federal court involvement. The tribal court's decision on the merits should be allowed to stand.

Federal courts are courts of limited jurisdiction. This Court has not previously held that an Indian tribe's assertion of legislative authority over activities engaged in by non-Indians on non-Indian owned fee lands gives rise to a federal question. *Amici* argue that this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), opens the back door to the federal courts by equating a tribe's civil adjudicatory authority to its legislative authority. That decision suggests that the lower federal courts may look behind a tribal court's determination of its subject matter jurisdiction to review the separate and distinctly tribal law question of a tribe's legislative authority over non-Indians within the reservation. *Amici* argue that such review exceeds the jurisdiction of the federal courts.

However, even if the Court holds that a tribe's assertion of legislative jurisdiction over a non-member engaged in activity on non-Indian owned fee lands presents a federal question, the abstention rule adopted in *National Farmers Union* and *Iowa Mutual* should still apply. *Amici* urge the Court to adopt a standard of post-exhaustion review that affords tribal decisions greater deference than that applied to date by the courts of appeals, including the Tenth Circuit below. Given well-established Congressional support for tribal self-government and self-determination, and acknowledging that Congress has not spoken in this area, caution is advised lest "unconditional access to the federal forum . . . impair the [tribes'] authority over reservation affairs." *Iowa Mutual*, 480 U.S. at 16.

Below, the district court and the court of appeals correctly decided that the Supreme Court of the Navajo Nation had jurisdiction to decide Petitioner's challenge to the Nation's Hotel Occupancy Tax. The courts below went on to hold that the Navajo Nation possessed, as a matter of federal law, jurisdiction to impose the tax in question on non-Indians purchasing lodging on fee lands within the reservation. While *amici* agree with that conclusion, they believe that, having found that the tribal court had jurisdiction to hear the mattter, no further inquiry into the merits of the case was either required or permitted. Accordingly, *amici* urge the Court to affirm the decision of the court of appeals that the Supreme Court of the Navajo Nation had jurisdiction to decide whether the Nation's Hotel Occupancy Tax was properly applied to Petitioner's non-Indian hotel guests. However, having resolved the federal question presented in the Nation's

favor, the court of appeals should have dismissed Petitioner's claim rather than proceeding to review the claim on the merits.

## ARGUMENT

### I. FEDERAL COURT ABSTENTION WAS APPROPRIATE IN THIS MATTER

In *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, this Court held that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] § 1331." 471 U.S. 845, 852. Declining to adopt a bright line rule foreclosing tribal court jurisdiction over civil matters arising on an Indian reservation and involving non-Indians,[2] the Court found that "the existence and extent of a tribal court's [civil] jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," an examination that "should be conducted in the first instance in the Tribal

[2] *Compare Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), holding categorically that an Indian tribe cannot exercise criminal jurisdiction over non-Indians.

Court itself." *Id.* at 855-56 (footnotes omitted).[3] Accordingly, the Court announced a rule requiring that a federal court stay its hand until a tribal court has had a full opportunity to determine its own jurisdiction. *Id.* at 857. The Court left to the lower courts the decision whether a federal action should be dismissed or held in abeyance. *Id.*

Petitioner, Atkinson Trading Company ("Atkinson"), originally filed an action in the United States District Court for the District of New Mexico contesting the power of the Navajo Nation to impose its Hotel Occupancy Tax on the purchase of rooms by non-Indian guests at the Cameron Trading Post, a facility owned by Atkinson and located on land owned by Atkinson in fee within the exterior boundaries of the Navajo reservation. The district court dismissed the matter without prejudice, directing Atkinson to exhaust its tribal remedies as required by *National Farmers Union. Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994). Pursuant to this direction, Atkinson filed an appeal with the Navajo Tax Commission, and then, as provided in 24 Navajo Nation Code ("N.N.C.") § 234, appealed to the Navajo Supreme Court from the Commission's decision upholding the applicability of the tax. The Navajo

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[3] Although the Court had enunciated a test for determining the propriety of an Indian tribe's assertion of regulatory jurisdiction over non-members in *Montana v. United States*, 450 U.S. 544 (1981), decided four years earlier, nowhere in *National Farmers Union* did the Court suggest that the *Montana* test should or would guide the tribal court or federal court's decision on whether tribal civil adjudicatory jurisdiction was present.

Supreme Court affirmed the decision of the Tax Commission. The court found that it had jurisdiction to hear the matter pursuant to 7 N.N.C. § 254,[4] and held that the Nation's assertion of taxing jurisdiction was consistent with this Court's rulings in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Montana v. United States*. Pet. App. D, p. 76a. Atkinson then returned to the district court, seeking a declaratory judgment that the Nation lacked jurisdiction to impose its Hotel Occupancy Tax.

## II. THE POST-EXHAUSTION STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS FAILS TO ACCORD PROPER DEFERENCE TO TRIBAL COURT DECISION-MAKING

The district court applied the standard of review established by the Court of Appeals for the Tenth Circuit in *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 520 U.S. 1139 (1997). In *Mustang*, the court of appeals held that in reviewing a tribal court's assertion of jurisdiction over non-members, the proper standard of review is for the federal courts to review the

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[4] 7 N.N.C. § 254 provides:

> The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian Communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any band of Navajo Indians.

tribal court's findings of fact for clear error, while subjecting the tribal court's conclusions of law to *de novo* review. *Id.* at 1384.[5] The district court granted the Nation's motion for summary judgment, applying the *Mustang* standard of review. The court of appeals affirmed, *Atkinson Trading Co. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000), and it is from this decision that Petitioner seeks review.

While *amici* tribes believe that both the district court and the court of appeals reached the correct result, in both cases their review of the merits was unnecessary and, in fact, exceeded their authority as defined by the United States Constitution, federal statutes, and the decisions of this Court. Federal courts are courts of limited jurisdiction.[6] In *National Farmers Union*, this Court held that a *tribal court's* assertion of jurisdiction over non-Indians gives rise to a federal question. However, both the district court and the court of appeals collapsed the question of the Navajo Nation's assertion of jurisdiction to adjudicate this civil matter into the question of the Navajo Nation's power to tax non-Indians who procure lodging on fee lands within the Nation's reservation.

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[5] In *Mustang*, the Tenth Circuit adopted the standard of review previously established by the Ninth Circuit in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991), in which the court observed that the "standard of review of a tribal court decision regarding tribal jurisdiction is a question of first impression among the circuits." *Id.* at 1313. Both the Tenth and the Ninth Circuits failed to consider the direction in *Iowa Mutual*, discussed more fully at pp. 10-12, *infra*, that if the district court determines that the tribal court had jurisdiction, its review is complete.

[6] U.S. Const., Art. 3, sec. 2, cl. 1.

Neither the district court nor the court of appeals even addressed the factors set forth in *National Farmers Union* for determining when a tribal court may exert its civil adjudicatory authority over non-Indians. Instead, each opinion appears to assume that such jurisdiction is proper in the instant case, and discusses the merits of the dispute which have already been disposed of by the Navajo Nation Supreme Court. One possible explanation for this analytical leap is this Court's suggestion in *Strate v. A-1 Contractors*, that as to non-Indians, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." For reasons set forth more fully below, *amici* believe that this suggestion was incorrect.

In *Iowa Mutual Ins. Co. v. LaPlante*, this Court had a second opportunity to consider the application of the Indian abstention doctrine announced in *National Farmers Union*. In *Iowa Mutual*, the insurance company filed an action in the federal district court based on diversity of citizenship under 28 U.S.C. § 1332, asserting it had no duty to defend its insured while an action between the same parties was pending in the Blackfeet Tribal Court system. In reviewing the decision of the tribal trial court, this Court noted that the "tribal court addressed the issue of subject matter jurisdiction, holding that the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. Since [under Blackfeet law] the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction, the court concluded that it would have jurisdiction over the suit." 480 U.S. 9, 12. Thus, in *Strate* this Court appears to have assumed that this feature of Blackfeet tribal law was a principle of federal law limiting the jurisdiction of all

tribes. That assumption appears to have caused the lower courts to bypass an important step is assessing the decisions of tribal courts such as the one involved in this case.

In *Iowa Mutual* this Court acknowledged that "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Id.* at 14-15. Finding that a "federal court's exercise of jurisdiction can . . . impair the authority of tribal courts," *id.* at 15, the Court concluded that a federal court must abstain in the first instance, regardless of the basis for jurisdiction, because "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs," *id.* at 16. In *Iowa Mutual*, the Court for the first time discussed the scope of review in the federal courts after a tribal court has been given the opportunity to determine its own jurisdiction. The Court held that if the highest tribal court determines that it has jurisdiction, then that ruling is subject to review in the federal courts. The Court continued: "Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues . . . resolved in the Tribal Courts." *Id.* at 19. The Court also opined that the policy considerations which underlie the Indian abstention doctrine are analogous to the principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *Iowa Mutual*, 480 U.S. at 16 n.8. Even where tribal and federal courts may have concurrent jurisdiction, such as in diversity cases or where tribal court jurisdiction over a non-Indian gives rise to federal question, exhaustion of

tribal remedies is required as a matter of comity and "strong federal policy concerns favor[ ] resolution in the nonfederal forum." *Id.*[7]

Below, the district court dismissed without prejudice the initial action brought by Atkinson, directing that Petitioner first exhaust its tribal remedies. The Navajo Supreme Court found that it had jurisdiction to review the decision of the Navajo Tax Commission holding that Atkinson's hotel guests were subject to the Nation's Hotel Occupancy Tax and affirmed the Commission's decision. Upon the refiling of the matter in the district court, under *Iowa Mutual* the district court should first have determined if the Navajo Supreme Court properly construed its jurisdiction. Having correctly concluded that the Navajo Supreme Court had such jurisdiction, the district court should have dismissed this matter without reaching the merits.

## III. GIVEN THE UNIQUE STATUS OF TRIBAL GOVERNMENTS AND CONGRESS' PLENARY POWER OVER INDIAN TRIBES, "FEDERAL QUESTION" JURISDICTION SHOULD BE NARROWLY CONSTRUED TO AVOID SUBJECTING EVERY ACTION BY A TRIBAL GOVERNMENT TO POTENTIAL FEDERAL COURT REVIEW

This Court's holding in *National Farmers Union* that a tribal court's exercise of jurisdiction over non-Indians

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[7] It appears that the Court, while finding the policy bases for Indian abstention analogous to those of *Colorado River* abstention, did not incorporate the other factors applied by the Court in *Colorado River*, such as the requirement that there be an action pending in the tribal court.

gives rise to a federal question is clear. However, the basis for that holding is problematic. The Court held that because "the question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court *is one that must be answered by reference to federal law*," it presents a federal question under 28 U.S.C. § 1331. *National Farmers Union*, 471 U.S. at 852. As the Court also noted, "the power of the Federal Government over the Indian tribes is plenary," *id.* at 851, and to invoke the jurisdiction of the federal courts a party must contend that federal law has curtailed the powers of a tribe.[8] The logical conclusion to this line of analysis is that any exercise of power by a tribal government, whether over members or non-Indians, gives rise to a federal question. Every exercise of tribal power gives rise to the question whether the tribe has been divested of that power by treaty, statute, judicial decision, or by implication because the power is inconsistent with the tribe's "dependent status" upon incorporation within the United States. Applying this logic, the courts of appeals have extended the holding of *National Farmers Union* to encompass assertions of tribal regulatory authority over non-Indians, mistakenly holding that such assertions of tribal governmental power give rise to a federal question. *See, e.g., Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995). This Court's decision in *Strate v. A-1 Contractors* compounds the confusion engendered by *National Farmers Union*.

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[8] It is interesting to note that the "plenary power of Congress," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), over Indian affairs has more recently been characterized by the Court as the plenary power of the "Federal Government."

This Court's decision in *Strate* sent a shock wave through Indian country. The Court's decision – that the test established in *Montana* to determine whether a tribe could exercise civil regulatory authority over the activities of non-Indians on non-Indian owned fee lands is to be the test applied in determining a tribal court's adjudicatory authority over non-Indians – was arrived at through a strained construction of the Court's precedents that began with *Montana* itself.[9]

Discussing those inherent sovereign powers retained by the tribes and those impliedly divested, the Court in *Montana* cited *United States v. Wheeler*, 435 U.S. 313 (1978), for the proposition that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the *relations between an Indian tribe and nonmembers of the tribe. . . .* " *Id.* at 564 (emphasis and ellipses in *Montana*). The Court omitted the citations which followed this original pronouncement in *Wheeler*. Those citations make clear that the powers the Court was referring to, and which tribes have been impliedly divested of, are powers more consistent with those of an independent foreign state than those of a "dependent" nation incorporated within the United States.[10] The

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[9] While the Court in *Strate* suggested that it was merely applying Court precedent and that there was nothing radical in its holding, the Court of Appeals for the Ninth Circuit observed that "*Strate* altered the lens through which we view the boundaries of a tribal court's civil adjudication." *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1964 (2000).

[10] The *Wheeler* Court continued:

> Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. *Oneida Indian*

Court in *Wheeler* did not suggest that tribes had been divested of civil authority over non-Indians found within their territorial jurisdiction.

Eight years later, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), Justice White, writing for a plurality of the Court, expanded *Montana's* mischaracterization of *Wheeler* to a "general principle" that the exercise of tribal regulatory authority over non-Indians without express congressional delegation, with two exceptions, is inconsistent with the tribes' dependent status. *Id.* at 426. As Justice Blackmun pointed

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> *Nation v. County of Oneida*, 414 U.S. 661, 667-668; *Johnson v. M'Intosh*, [21 U.S.] 8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. *Worcester v. Georgia*, [31 U.S.] 6 Pet. 515, 559; *Cherokee Nation v. Georgia*, [30 U.S.] 5 Pet. [1, 17-18]; *Fletcher v. Peck*, [10 U.S.] 6 Cranch 87, 147 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. *Oliphant v. Suquamish Indian Tribe*, [435 U.S. 191].

435 U.S. at 326 (parallel citations omitted). Similarly, in *Washington v. Confederated Tribes of Colville Indian Reservation*, the Court made the following statement:

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

447 U.S. 134, 153-54 (1980).

out in his opinion concurring in the judgment and dissenting:

> But Montana is simply one, and not even the most recent, of a long line of our decisions discussing the nature of inherent tribal sovereignty. These cases, landmarks in 150 years of Indian-law jurisprudence, establish a very different "general principle" governing inherent tribal sovereignty – a principle according to which tribes *retain* their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be inconsistent with the overriding interests of the National Government.

*Id.* at 450 (quotations omitted) (emphasis in original); *see also South Dakota v. Bourland*, 508 U.S. 679, 699 n.2 (1993) (Blackmun, J., dissenting) (restating objection to the Court's characterization of the holding of *Montana*).

In *Strate*, the Court completed the process of implying divestiture of tribal civil authority by extending that divestiture to tribal adjudicatory power over non-Indians. Confronted with its earlier, and apparently controlling, statement in *Iowa Mutual* that "[c]ivil jurisdiction over such activities [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statutes," the Court proceeded to construe the statement in the "context" of the three cases that *preceded*

it.[11] Viewed in this "context," the Court reframed the statement into "the unremarkable proposition that, where tribes possess the authority to regulate the activities of non-members, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.' " 520 U.S. 438, 453. Having rewritten the Court's precedent, the *Strate* Court announced the corollary, but neither logically nor legally necessary, proposition that "a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction." *Id.* No other court system in the United States is subject to such a limitation. The Court of Appeals for the Ninth Circuit offered a cogent argument for distinguishing between a tribal court's adjudicatory and regulatory jurisdiction:

> Cases are commonly adjudicated in forums that would lack the authority to regulate the subject of the disputes. *See generally Allstate Insurance Company v. Hague*, 449 U.S. 302 (1981). In analyzing whether a dispute may be decided in a particular state or federal court, we have inquired only whether the court's exercise of

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[11] The relevant portion of the Court's analysis in *Iowa Mutual* is as follows:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-566 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980); *Fisher v. District Court [of Sixteenth Judicial Dist. of Mont.]*, 424 U.S. [382,] 387-389 [1976]. Civil jurisdiction over such activities presumptively lies in the tribal court unless affirmatively limited by a specific treaty provision or federal statute. . . .

480 U.S. 9, 18.

> jurisdiction is authorized by the applicable forum law and whether it comports with due process. *See, e.g., Keeton v. Hustler Magazine*, 465 U.S. 770 (1984). The jurisdictional question is not controlled by whether it would be appropriate to apply the forum's substantive law to the dispute. *See Shaffer v. Heitner*, 433 U.S. 186, 215 (1977). The tribal character of a challenged forum does not alter the essential nature of this inquiry. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

*National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 736 F.2d 1320, 1322 n.3 (9th Cir. 1984), *rev'd on other grounds*, 471 U.S. 845 (1985) (parallel citations omitted). In addition, this Court has acknowledged that "tribal courts, like state courts, can and do decide questions of federal law. . . . " *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999).

Equating tribal adjudicatory power with tribal legislative – including regulatory and taxing – authority, undermines the holdings of *National Farmers Union* and *Iowa Mutual* that decisions of a tribal court are entitled to deference and may be disturbed only when a reviewing federal court finds that the tribal court lacks jurisdiction over the matter. This equation invites the federal courts to look behind a tribal court's jurisdictional determination and review the question of whether the tribal government properly exercised its legislative authority. Federal court review should be limited to the question of whether a tribal court has exceeded its jurisdiction in

adjudicating a matter involving non-Indian activity within Indian country.

Assuming, *arguendo*, that a tribe's efforts to extend its laws to non-Indians on non-Indian owned fee lands does present a federal question, the federal courts should accord significant deference to tribal court decisions construing tribal authority. First, the abstention rule announced in *National Farmers Union* should pertain. Second, post-exhaustion review in the federal courts should be narrow in scope. Congress has not provided for federal court review of tribal court decisions in civil matters by statute.[12] However, Congressional policies supporting tribal self-governance and self-determination suggest that a unique scope of review, tailored to advance these goals, is appropriate.[13] The scope of review adopted by the

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[12] Even when Congress passed the Indian Civil Rights Act, Pub. L. 90-284 (1968) (codified at 25 U.S.C. §§ 1301 *et seq.*), imposing a unique bill of rights on Indian tribes, it did not provide for broad federal court jurisdiction to hear alleged violations of the Act. Accordingly, the Court in *Santa Clara Pueblo* declined to imply a cause of action because "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." 436 U.S. 49, 59-60.

[13] One scholar has suggested borrowing from the jurisprudence of administrative law. *See* Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M.L.Rev. 191, 211 (1994). The author proposes the following procedure:

> [A] federal court would review independently whether the tribal court has adopted the correct test for determining if tribal jurisdiction has not been

courts of appeals, and applied by the courts below, does little to advance these Congressional goals or to enhance the role of tribal courts.

## CONCLUSION

In civil matters involving non-Indians arising within the territorial jurisdiction of Indian tribes, the federal courts should abstain, as directed in *National Farmers Union* and *Iowa Mutual*, to allow tribal courts to determine, in the first instance, their adjudicatory jurisdiction, and if they find such jurisdiction, to determine such matters on their merits. As this Court's precedents makes clear, a tribal court's assertion of jurisdiction over a non-Indian presents a federal question. On review in the federal district courts, the court should determine whether the tribal court's decision regarding its adjudicatory jurisdiction was correct. If the district court determines that the tribal court properly exercised its adjudicatory jurisdiction, the case should be dismissed and the tribal court's decision on the merits allowed to stand. Tribal courts play a vital part in tribal self-government. The decisions of tribal courts must be accorded a

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implicitly divested. The second step of the process, however, the task of determining under *Montana*, if a consensual relation existed or if the activity is necessary to tribal self-government or vital to tribal integrity and self-determination, would only be reviewed under a reasonableness or rational basis test.

*Id.* at 219.

meaningful measure of deference if tribes are to continue to develop competent judiciaries as Congress clearly intended. For all the forgoing reasons, the decision of the Court of Appeals for the Tenth Circuit holding that the courts of the Navajo Nation had jurisdiction to adjudicate Petitioner's tax claim should be affirmed.

Respectfully submitted,

SUSAN M. WILLIAMS
*Counsel of Record*
M. KATHRYN HOOVER
WILLIAMS, JANOV & COONEY, P.C.
2501 Rio Grande Boulevard NW
Albuquerque, New Mexico
87104-3223
(505) 842-6961

*Attorneys for the Colorado River Indian Tribe, Eastern Shoshone Tribe of the Wind River Reservation, First Mesa Consolidated Villages of the Hopi Tribe, Lummi Nation, Pueblo of San Felipe, and Zuni Indian Tribe*